IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.18999 of 2005

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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SAURABH USHAKANT MARFATIA - Petitioner(s)
Versus
ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE-3(1)

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Appearance :
MR JP SHAH for Petitioner(s) : 1,MR MANISH J SHAH for Petitioner(s) : 1,
MR BB NAIK for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI
Date : 14/12/2005
ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. This petition, under Article 226 of the Constitution of India, challenges notice dated

23rd January, 2004 issued under Section 158BD read with Section 158BC of the Income-tax Act, 1961 (the Act) by the respondent.

2. The brief facts necessary for the present purpose may be stated. On 21st December, 1999 action under Section 132 of the Act was taken against one Shri Narendra Garg and others. From the premises of Shri Garg a diary was found which recorded payment of 'on money' to Shri Jagdish Marfatia. Thereupon an order came to be passed under Section 158BD read with Section 158BC of the Act in case of Shri Jagdish Marfatia. The case of the revenue was that Shri Garg had purchased a parcel of land from a Company named Marfatia Udyog Private Limited and the seized documents indicated payment of a sum of Rs.2,05,00,000/- to Shri Jagdish Marfatia. Shri Jagdish Marfatia challenged the said order by way of appeal before the Commissioner (Appeals) who framed order on 5th March, 2003 holding that Shri Jagdish Marfatia was liable to be taxed only on a proportionate amount accepting the contention of Shri Jagdish

Marfatia that he can be taxed only to the extent of his shareholding and the balance amount from the sum of Rs.2,05,00,000/- should be brought to tax in hands of other shareholders.

3. It is at this stage, pursuant to order made by the Commissioner (Appeals) on 5th March, 2003, that the impugned notice dated 23rd January, 2004 has been issued to the petitioner and ten others.

4. The case of the petitioner is that the aforesaid notice is without jurisdiction in as much as the pre-requisite conditions laid down by Section 158BD of the Act are not satisfied. As against that Mr.B.B. Naik, appearing on behalf of the respondent in this petition and Mr.M.R.Bhatt appearing on behalf of the respondents in some of the other group petitions, have contended that once Shri Jagdish Marfatia had accepted that the amount was received by him on behalf of other shareholders in the proportion of their respective shareholdings, the respondent authority was empowered to act against the

petitioner and other shareholders. It is submitted that the Assessing Officer of Shri Garg had recorded satisfaction regarding receipt of the cash component of the transaction by Shri Jagdish Marfatia and Shri Jagdish Marfatia having accepted before the Commissioner (Appeals) that he was liable to be taxed to the extent of his own shareholding, as a natural consequence, all other shareholders of the Private Limited Company had to be subjected to tax in proportion to their respective shareholdings. Responding to the submission on behalf of the petitioner that provisions of Section 158BD could not be invoked, it was submitted that once the said section had been validly invoked in case of Shri Jagdish Marfatia, the other shareholders would step into the shoes of Shri Jagdish Marfatia when the Commissioner (Appeals) held that the amount was only proportionately taxable in the hands of Shri Jagdish Marfatia. It was also submitted, in the circumstances, the satisfaction recorded by the Assessing Officer having jurisdiction over the searched person viz. Shri Garg, would be deemed

to have recorded his satisfaction qua other shareholders also because the satisfaction pertains to entire sum which was now being brought to tax in hands of different persons.

5. Mr.Shah, in rejoinder, invited attention to the decision rendered by this Court in case of Nitin P. Shah alias Modi Vs. Deputy Commissioner of Income-tax, [2005] 276 ITR 411, with special reference to findings recorded at Page No.433 onwards, to submit that there was no nexus between the satisfaction recorded by the Assessing Officer of Shri Garg as regards any undisclosed income belonging to any of the petitioners.

6. On behalf of the respondent authority satisfaction note dated 31st July, 2000 recorded by the Assessing Officer having jurisdiction over Shri Narendra Garg has been placed on record. The said note specifically refers to the seized material and records “showed that amount of Rs.2.05 crores was paid to Shri Jagdishchandra

Marfatia, the details of which are as follows". Thereafter the satisfaction note refers to the statement of Shri Narendra Garg and his admission on 5th January, 2000, of having paid the total amount of purchase consideration to Shri Jagdishchandra Marfatia. The satisfaction note also refers to statement dated 18th January, 2000 recording admission of Shri Jagdishchandra Marfatia. At the end, it is stated that the undisclosed income has not been brought to tax and hence, it was a fit case for issuance of notice under Section 158BD read with section 158BC of the Act. From the concluding portion of the satisfaction note, it appears that the Assessing Officer having jurisdiction over Shri Narendra Garg and Shri Jagdishchandra Marfatia is one and the same.

7. On going through the note it is apparent that the Assessing Officer has nowhere recorded that Shri Garg had paid any 'on money' to any of the petitioners. Therefore, the requirement of opening portion of Section 158BD of the Act does

not stand satisfied. In the case of Nitin P. Shah (supra) this Court has stated:

> " On a plain reading, before the section comes into play, the following conditions are required to be satisfied:
>
> (i) The Assessing Officer who is assessing the person searched, has to be satisfied that any undisclosed income belongs to a person other than the person searched;
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> (ii) Secondly, the books of account, other documents or assets seized shall be handed over to the Assessing Officer having jurisdiction over such other person."

8. On behalf of the respondent authority nothing has been brought on record to show that there was any satisfaction recorded by the Assessing Officer of Shri Garg that the amount or any part of Rs.2.05 crores was paid to the petitioner or any other shareholder, except Shri Jagdishchandra Marfatia. What is the effect of the stand of Shri Jagdishchandra Marfatia before the Commissioner (Appeals) viz. that he should be taxed only to the extent of his shareholding, is not the subject matter and scope of this petition and the Court need not dwell upon it. The contention that the petitioner along with other shareholders

would step into the shoes of Shri Jagdishchandra Marfatia after the order of the Appellate Authority indicates that the Revenue accepts the position that till that point of time, i.e. upto the passing of appellate order in case of Shri Jagdishchandra Marfatia there was no satisfaction (at least none has been recorded) to establish any live link between the Assessing Officer having jurisdiction over Shri Garg and the material available with him, and the petitioner and other shareholders. The distinction between the person searched and other person(s) has to be borne in mind. Section 158BD of the Act cannot be used as an omnibus provision.

9. In light of the aforestated facts which are undisputed, and the ratio enunciated by this Court as to the requirement of provisions of Section 158BD of the Act, the impugned notice dated 23rd January, 2004 issued under Section 158BD read with Section 158BC of the Act (Annexure-C) cannot be upheld. The same is, accordingly, quashed and set aside.

10. Rule made absolute. The petition is allowed, accordingly. There shall be no order as to costs.

Sd/-
[D.A. MEHTA, J]

Sd/-
[H.N. DEVANI, J]

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*Bhavesh**